

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)

) Case No. CIV 96-196 B
)
)

CITY OF STILWELL, OKLAHOMA,)
 ET AL.,)
)
 Defendants.)

UNITED STATES' STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE

In support of the accompanying United States' Motion for Summary Judgment, the United States asserts the following material facts as to which there is no genuine issue:

DEFENDANTS

1. The City of Stilwell sells electricity to residential, commercial and individual customers inside city limits and surrounding portions of Adair County, Oklahoma through the Stilwell Utility Department ("UD"). Answer of Defendant City of Stilwell, Oklahoma, a Municipal Corporation, and Stilwell Area

Development Authority, a Public Trust at ¶ 2 (Exhibit 1); Defendants' Answer to CID #12786 at ¶ 1 (Exhibit 2); Adair Dep. at 10-11 (Exhibit 3).

2. The City of Stilwell provides water and sewer services to customers within and around its corporate boundaries through the Stilwell Area Development Authority ("ADA"). Answer of Defendants at ¶ 2 (Exhibit 1); Defendants' Answer to CID at ¶ 1 (Exhibit 2); Adair Dep. at 11 (Exhibit 3).

3. The City of Stilwell is a charter municipality established under the laws of Oklahoma. Its Utility Department was established by § 106 of the City's Charter to provide electricity within and around the City's corporate boundaries. The Utility Department is governed by a Utility Board of five members appointed by the Mayor with approval of City Council, and subject to City Council oversight. Answer of Defendants at ¶ 4 (Exhibit 1); Defendants' Answer to CID at ¶ 1(a) and (c) (Exhibit 2).

4. The Stilwell Area Development Authority is a public trust established under Oklahoma law to provide water and sewer for compensation within and around the City's corporate boundaries. It is governed by a Board of Trustees, whose membership is identical to the Stilwell Utility Department, and is likewise subject to City Council oversight. Answer of Defendants at ¶ 5 (Exhibit 1); Defendants' Answer to CID at ¶ 1(a) and (c) (Exhibit 2).

VENUE AND INTERSTATE COMMERCE

5. Venue is proper in this District under 15 U.S.C. §§ 22 and 28 U.S.C. § 1391(c) because defendants transact business and are found here. Answer of Defendants at ¶ 7 (Exhibit 1).

6. The City of Stilwell is only nine miles from the Arkansas border. Langley Dep. at 143 (Exhibit 4).

7. The City of Stilwell purchases electric power from the Grand River Dam Authority ("GRDA") which it sells to its customers. GRDA is part of an integrated electric power network interconnected throughout the Southwest. It is also a member of the Southwest Power Pool, a coordinated electric power interchange system headquartered in Arkansas that consists of multiple members from eight states throughout the Southwest. Because GRDA's electric utility generating units and transmission lines interconnect with generating units and transmission lines outside Oklahoma, electricity purchased and resold by Stilwell is commingled with electricity generated outside Oklahoma. Langley Dep. at 8-10 (Exhibit 4); Form EIA-412 Annual Reports (1993-1995) submitted by GRDA to the Department of Energy (Exhibit 7); Form OE-411 Coordinated Regional Bulk Power Supply Program report submitted by Southwest Power Pool to the Department of Energy, April 1, 1995 at 3, 4-A-2 (Exhibit 8). *See also* U.S. Congress, Office of Technology Assessment, *Electric Power Wheeling and Dealing: Technological Considerations for Increasing Competition*, OTA-E-409 (Washington, DC: U.S.

Government Printing Office, May 1989); *Cincinnati Gas & Electric Co. v. Federal Power Comm'n*, 376 F.2d 506, 507-08 (6th Cir.), *cert. denied*, 389 U.S. 842 (1967).

8. In one year, defendants' obtained more than \$3.3 million from the federal government to build and expand their utility systems. City's Response to Plaintiff's Interrogatories and Request for Production of Documents at ¶ 1 (Exhibit 9); Letter from Cole to Read dated October 21, 1997 (Exhibit 10); Adair Dep. at 25-28, 59-60, 62-63, 68, 105 (Exhibit 3).

9. Defendants directly purchased more than \$680,000 worth of goods and services between 1995 and the first quarter of 1997 from out-of-state companies. Affidavit of Michael G. Taub (Exhibit 11); *see also* Zimmerman Dep. at 56 (Exhibit 5).

SEWER, WATER AND ELECTRICITY MARKETS

Sewer

10. The Stilwell ADA has no competitors in the provision of sewage service in and around Stilwell. Answer of Defendants at ¶3 (Exhibit 1); Defendants' Answer to CID at ¶¶ 1(g) and 5(c) (Exhibit 2); Adair Dep. at 16-17, 41 (Exhibit 3); Langley Dep. at 41-42 (Exhibit 4).

11. State and lending regulations may prohibit a customer from using a septic system. Rucker Dep. at 47-48 (Exhibit 12); Langley Dep. at 44-45 (Exhibit 4); *see also* 7 C.F.R. § 1944.215(r)(3) (1997); OKLA. ADMIN. CODE tit. 252, ch. 640, 655 (1997).

12. It costs at least \$2000 to build a septic system in and around Adair County, and may be more expensive if the terrain is rocky. There are also costs to maintain a septic system. In comparison, to hook up to the City's sewer system, requires only a \$150 tap fee, \$150 deposit, and minimum bill of \$6 per month based upon water usage. Langley Dep. at 23, 43-44 (Exhibit 4); *see also* Adair Dep. at 32-33 (Exhibit 3) (septic tank use is cost prohibitive as compared to using the city's sewer system).

13. About 95% of the residents and businesses in the Stilwell city limits purchase sewer service from the City. The remaining 5% rely on septic systems. Langley Dep. at 42-43 (Exhibit 4).

Water

14. The Stilwell ADA is the only entity permitted to supply water within the corporate limits of the City. Answer of Defendants at ¶ 9 (Exhibit 1) (stating that "[r]ural water districts in Oklahoma are prohibited to provide water within corporate limits of a municipality"); Langley Dep. at 59 (Exhibit 4).

15. The rural water districts ("RWDs") do not compete against Stilwell for water customers. Thus, customers in Adair County do not have a choice of water suppliers. Defendants' Answer to CID at ¶¶ 1(g) and 5(c) (the defendants have no competitors; the City does not consider anyone as a competitor) (Exhibit 2); Langley Dep. at 62-63 (Exhibit 4).

16. The RWDs surrounding Stilwell -- RWD Nos. 2, 3, 4 and Cherry Tree -- purchase their water requirements from the Stilwell ADA. The Stilwell ADA charges them a higher rate for water than it does to its residential customers. Adair Dep. at 17-19 (Exhibit 3); Water Purchase Contracts (Exhibit 19); Langley Dep. at 22-24 (Exhibit 4).

17. When the City has annexed into RWD territory, it has taken over the RWD water lines and customers. Adair Dep. at 17-19 (Exhibit 3); Langley Dep. at 34, 58-59 (Exhibit 4).

18. Drilling private wells is not a practical alternative for many developers. Compliance with state and federal regulations make the expense of drilling a well and treating the water uneconomical compared to using municipal water service for developers of federally-financed housing or other public buildings. Adair Dep. at 31-32 (Exhibit 3); Rucker Dep. at 46-47 (Exhibit 12); Langley Dep. at 45-46 (Exhibit 4); Davidson Dep. at 47-48 (Exhibit 13); 7 C.F.R. § 1944.215(r)(3) (1997); OKLA. ADMIN. CODE tit. 252, ch. 625 (1997).

19. Even if one chooses to drill a well, there is no guarantee of securing an adequate supply of safe, potable water. Adair Dep. at 32 (Exhibit 3); Davidson Dep. at 43 (Exhibit 13); Langley Dep. at 52-53 (Exhibit 4).

20. The Stilwell ADA provides water service to at least 90 percent of the population within the City's limits, including annexed territory. Langley Dep. at 52-53 (Exhibit 4).

21. Since the infrastructure needed to build water and sewer systems is capital intensive and there are regulatory barriers, it is unlikely that a competitor will enter and begin to provide water and sewer services in Adair County. Langley Dep. at 56-58 (Exhibit 4); Defendant's Answer to CID at ¶ 5(c) ("There is no one else to provide water and sewer service, which is not a lucrative venture") (Exhibit 2).

22. Water and sewer services are basic needs for the health and welfare of any community. Defendants' Answer to CID at ¶ 6(a) (Exhibit 2).

Electricity

23. The Stilwell UD has for many years operated as the only municipal electric company providing service to the City of Stilwell within its pre-1961 city limits. Adair Dep. at 10, 17 (Exhibit 3); Crozier Dep. at 5 (Exhibit 6).

24. The demand for electricity is inelastic, meaning as the price increases, the amount that purchasers are willing to purchase stays roughly the same or

increases. Moreover, the City of Stilwell has the power to set its own electricity rates, without any other regulatory approval. Langley Dep. at 16, 37-39 (Exhibit 4).

25. Electricity and water/sewer are distinct products. Langley Dep. at 36-37 (Exhibit 4).

OZARKS RURAL ELECTRIC COOPERATIVE

26. Ozarks Rural Electric Cooperative Corporation (Ozarks) is a rural electric cooperative headquartered in Fayetteville, Arkansas. Roughly 25 percent of Ozarks' customers (members) are located in Oklahoma, the majority of which are in Adair County. Crozier Dep. at 3-4, 75-76 (Exhibit 6).

27. Ozarks purchases the electric power it distributes to its members from KAMO Electric Cooperative, Inc. ("KAMO"), a non-profit rural generation and transmission cooperative. KAMO provides wholesale electric service to 17 distribution cooperatives that have 285,000 members in northeast Oklahoma and southwest Missouri. Crozier Dep. at 73-74, 76 (Exhibit 6); Langley Dep. at 10 (Exhibit 4); *City of Stilwell v. Ozarks Rural Electric Cooperative Corporation*, 79 F.3d 1038, 1042 (10th Cir. 1996).

28. KAMO, like GRDA, is part of an integrated electric power network interconnected throughout the Southwest. It is also a member of the Southwest Power Pool. Because KAMO's electric utility generating units and transmission

lines interconnect with generating units and transmission lines outside Oklahoma, electricity purchased and resold by Ozarks is generated or commingled with electricity generated outside Oklahoma. Crozier Dep. at 76-77 (Exhibit 6); SOF at ¶ 7.

29. Ozarks directly purchases goods and services used to supply electricity to its customers from out-of-state companies. Crozier Dep. at 84-85 (Exhibit 6).

30. The Stilwell Utility Department competes with Ozarks for new customers in areas of Adair County annexed or proposed for annexation into the City after 1961. Oklahoma Rural Electric Cooperative Act, *as amended*, OKLA. STAT. ANN., tit. 18 § 437.2(k) (West 1986 & Supp. 1996); Adair Dep. at 17-18, 67-68 (Exhibit 3); Crozier Dep. at 44-45, 67 (Exhibit 6).

31. Through annexation, the City's boundaries have expanded to include a significant portion of the area previously served by Ozarks. Adair Dep. at 15-16, 41-42, 53-54, 94-95, 118-120 (Exhibit 3); Langley at 19, 63-64 (pre-condemnation, Ozarks had 125 customers in annexed territory) (Exhibit 4); Answer of Defendants at ¶ 11 (Exhibit 1).

32. To compete for new customers, Ozarks sometimes offers substantial economic incentives and other services, including rebates on water heaters and heat pumps, a special economic development rate through its supplier KAMO and to place (at its own expense) the distribution facilities underground as opposed to on

overhead poles. Rucker Dep. at 13 (Exhibit 12); Davidson Dep. at 51-53 (Exhibit 13); Crozier Dep. at 78-79 (Exhibit 6); Adair Dep. at 81, 84 (Exhibit 3).

ALL-OR-NONE UTILITY POLICY

33. In 1985, Stilwell adopted an all-or-none utility policy, which denied water and sewer connections unless the customer also agreed to take City-supplied electricity. Answer of Defendants at ¶ 3 (Exhibit 1); Defendants' Answer to CID at ¶¶ 5 and 6(b) (Exhibit 2); Adair Dep. at 51-52 (Exhibit 3).

34. The all-or-none policy was unwritten until spring of 1994, when it was formally adopted by the Stilwell UD and ADA governing boards, and the City Council. The Stilwell UD and ADA governing boards also recommended that the all-or-none policy be enforced through the building permit process, and that the City Council and Mayor "give some teeth" to it. The City Council obliged at its May 2, 1994 meeting, by adopting a resolution approving the policy. Answer of Defendants at ¶¶ 13 and 14 (Exhibit 1); Defendants' Answer to CID at ¶¶ 6 and 7 (Exhibit 2); Adair Dep. at 51-52, 55-57, 87-88 (Exhibit 3); Stilwell ADA Board Meeting Agenda and Minutes of April 12, 1994 (Exhibit 14); Stilwell City Council Meeting Agenda and Minutes of May 2, 1994 (Exhibit 15).

Skywood Episode

35. ERC Properties, Inc. ("ERC") is an Arkansas-based property development and management construction firm that obtains funding for some of its housing projects from RECDS (formerly FHA). Rucker Dep. at 3, 6-7, 51 (Exhibit 12); Langley Dep. at 127 (Exhibit 4).

36. In August of 1993, Ozarks approached Steve Rucker of ERC offering to supply electricity to the final phase of the Skywood Apartments development, which consisted of 16 units located in an area annexed into the City of Stilwell. Rucker Dep. at 8, 12, 19 (Exhibit 12); Crozier Dep. at 40 (Exhibit 6); Letter from Crozier to Rucker dated August 11, 1993 (Exhibit 16).

37. Ozarks offered to provide ERC with rebates for each heat pump and water heater installed in each unit and to place, at its own expense, the electrical wires underground rather than on overhead poles. ERC accepted this proposal. Rucker Dep. at 13-15, 27 (Exhibit 12); Crozier Dep. at 40 (Exhibit 6), Letter from Crozier to Rucker dated August 11, 1993 (Exhibit 16); Adair Dep. at 81 (Exhibit 3).

38. In contrast, Stilwell offered no rebates and required the developer to dig the trenches and pay for the underground lines. Rucker Dep. at 27-30 (Exhibit 12); Adair Dep. at 81, 84 (Exhibit 3).

39. When Walter S. (Scottie) Adair, then Stilwell UD's general manager, heard that Ozarks was preparing to dig trenches to provide electric service to Skywood, he called Rucker and told him that Stilwell would not provide water or sewer service if ERC chose Ozarks to supply the electricity. Defendants' Answer to CID at ¶ 5(a) (Exhibit 2); Adair Dep. at 79-84 (Exhibit 3); Rucker Dep. at 20-22, 25 (Exhibit 12); Crozier Dep. at 41 (Exhibit 6).

40. Stilwell then turned off and padlocked a valve in the water distribution line connection at Skywood. This left some nearly finished buildings without water, even for fire protection. Defendants' Answer to CID at ¶ 5 (Exhibit 2); Adair Dep. at 86 (Exhibit 3); Rucker Dep. at 17, 24 (Exhibit 12); Crozier Dep. at 80-81 (Exhibit 6).

41. With the Skywood units virtually ready for occupancy, Rucker agreed to take the City's electricity. Rucker Dep. at 26, 29 (Exhibit 12); Crozier Dep. at 41, 81 (Exhibit 6).

Candle Ridge Episode

42. Stilwell UD's general manager also told ERC that Stilwell would not issue building permits for a similar 24-unit apartment project called Candle Ridge, located in an area annexed into the City of Stilwell, unless and until ERC committed in writing to obtain all utility services for the project from Stilwell.

Adair Dep. at 74-76 (Exhibit 3); Rucker Dep. at 32-33, 36, 49-52 (Exhibit 12); Letter from Crozier to Rucker dated April 19, 1994 (Exhibit 20)..

43. Ozarks had offered to provide electric service to Candle Ridge. But, ERC, having learned its lesson from the Skywood incident, agreed to use only city-supplied utilities for any projects in Stilwell. Adair Dep. at 74-75 (Exhibit 3); Rucker Dep. at 32, 34, 36, 49-52 (Exhibit 12); Letter from Rucker to Adair dated June 13, 1994 (Exhibit 17); Crozier Dep. at 42-43 (Exhibit 6).

Oklahoma Department of Human Services

44. A landowner named Kenneth Davidson planned to construct an office building, located in an area annexed into the City of Stilwell, and lease it to the Oklahoma Department of Human Services ("DHS"). Defendants' Answer to CID at ¶ 5(a) (Exhibit 2); Adair Dep. at 122-123 (Exhibit 3); Davidson Dep. at 23, 25, 53 (Exhibit 13).

45. Davidson preferred purchasing the electricity from Ozarks because Ozarks agreed to install the electric distribution system underground. The City had refused to install the wires underground, and Davidson did not want unsightly poles all over the property. Defendants' Answer to CID at ¶ 5(a) (Exhibit 2); Davidson Dep. at 29-30, 51-53 (Exhibit 13); Crozier Dep. at 46, 81-82 (Exhibit 6).

46. The Stilwell UD told Davidson that in order to use the City's sewer and water, he would have to purchase the City's electricity. Adair Dep. at 128 (Exhibit 3); Davidson Dep. at 26-28, 41 (Exhibit 13); Crozier Dep. at 48 (Exhibit 6); *see also* Defendants' Answer to CID at ¶ 5(a) (Exhibit 2).

47. No RWD would provide water to Davidson's planned DHS Building. Adair Dep. at 124-125 (Exhibit 3); Davidson Dep. at 44-47, 56-57 (Exhibit 13); Crozier Dep. at 47-48 (Exhibit 6); Defendants' Answer to CID at ¶ 5(a) (Exhibit 2).

48. For Davidson, drilling a well was neither a practical nor economic option compared to using the City's water. The school where Davidson is the administrator uses a well for water, but sulphur has contaminated the water supply. Since the school is a public building, the water has to be sampled each month by the Health Department, and the school had to put in a holding tank and change sand filters every six months in order to remove sulphur smell. In addition to the capital costs of the equipment, there are periodic operating and maintenance costs, which made a well an undesirable option for a public facility. Davidson Dep. at 43, 47-48 (Exhibit 13).

49. Davidson understood that in order to comply with state requirements, he would have to extend lateral sewer lines to a septic field across the street onto more of his property, which was going to be expensive. Davidson Dep. at 49-51 (Exhibit 13); Adair Dep. at 123, 125 (Exhibit 3).

50. Davidson finally agreed to take all three utilities from the City. Adair at Dep. at 127-130 (Exhibit 3); Davidson Dep. at 28, 53-54 (Exhibit 13); Crozier Dep. at 84 (Exhibit 6).

Results of Defendants' All-or-None Policy

51. Since the all-or-none policy began, Ozarks has successfully solicited and retained only one new customer in the annexed territory -- the Fellowship Baptist Church -- for which defendants decided not to condition the sale of sewer and water services on the sale of electric service. Thus, defendants' market share in the provision of electric service to new customers in the annexed territory is almost 100 percent. Crozier Dep. at 46, 69 (Exhibit 6); Langley Dep. at 64-65 (Exhibit 4).

52. Because of defendants' all-or-none utility policy, Ozarks Electric, based in Arkansas, was deprived of revenues of at least \$30,000 per year from the Skywood II, Candle Ridge and DHS building projects that were subjected to the defendants' all-or-none utility policy. Letter from Cole to Read dated October 21, 1997 (Exhibit 10); Crozier Dep. at 71-72 (Exhibit 6).

53. Because of defendants' all-or-none utility policy, ERC Properties and Kenneth Davidson were deprived of the economic and quality of service benefits provided by competition. Rucker Dep. at 27 (Exhibit 12); Adair Dep. at 81, 84 (Exhibit 3); *see also* SOF at ¶¶ 37, 45.

54. Since 1985, a number of new residential, commercial and industrial projects were constructed in annexed territory. These include Skywood, Skywood I, Henningsen's Cold Storage Facility, Wilma P. Mankiller Health Clinic, Two J.'s Food Court, Hogner Heights residential development, Southern Estates residential development, Stilwell High School, and Subway restaurant. Langley Dep. at 84-89, 133-143, 148-149 (Exhibit 4); Crozier Dep. at 69, 79, 85 (Exhibit 6). [NOTE: During discovery, defendants objected to providing a list of all their customers and electric revenues in the annexed areas as too burdensome, suggesting a significant number of customers are at issue.]

55. The above projects generate roughly the following annual electricity revenues: Skywood (\$32,000); Skywood I (\$35,000); Henningsen's Cold Storage (\$100,000); Wilma P. Man Killer Health Clinic (\$20,000); Two J.'s Food Court (\$12,000); Hogner Heights (\$90,000); Southern Estates (\$28,800); Stilwell High School (\$22,500) and Subway (unknown). Together they generate more than \$340,000 dollars per year in electricity revenues. Letter from Cole to Read dated October 21, 1997 (Exhibit 10); Langley Dep. at 87, 133-143, 148-149 (Exhibit 4).

56. If Ozarks had been allowed to compete and serve more customers in the annexed areas of Stilwell, it could have bought more equipment (i.e. poles, transformers, meters, cable, etc.) from suppliers located outside of Oklahoma. Crozier Dep. at 85 (Exhibit 6).

EVENTS SINCE THE DEPT. OF JUSTICE INVESTIGATION BEGAN

57. On August 22, 1995, faced with the Justice Department's investigation, the Stilwell Utility Department and Area Development Authority Boards rescinded their all-or-none policy and adopted a new policy of notifying prospective customers that they have a choice of electric suppliers. Letter from Cole to Kaufman dated Sept. 13, 1995 (with enclosures) (Exhibit 18); Adair Dep. at 64-66 (Exhibit 3).

58. The City Council, however, has never formally rescinded the policy. Adair Dep. at 64-66 (Exhibit 3); Crozier Dep. at 59-60 (Exhibit 6).

59. After the UD and ADA Boards rescinded the all-or-none policy in 1995, Stilwell condemned all of Ozarks electric facilities in the annexed portions of the City, taking more than 100 customers of Ozarks. Langley Dep. at 19, 63-64 (Exhibit 4); Crozier Dep. at 30-32 (Exhibit 6); *see also City of Stilwell v. Ozarks Rural Electric Cooperative Corporation*, 79 F.3d 1038 (10th Cir. 1996).

60. Ozarks received less compensation in its condemnation suit by the City of Stilwell because of the business it lost due to defendants' all-or-none utility policy, since the valuation of the condemned assets of Ozarks was computed using a formula based partly on the estimated revenues those assets would produce over the next 10 years. Crozier Dep. at 89 (Exhibit 6).

61. The City of Stilwell anticipates more growth and annexation in the future. Adair Dep. at 25 (Exhibit 3); Langley Dep. at 33-34 (Exhibit 4).

62. Ozarks intends to continue to compete and solicit new customers in the annexed areas. Crozier Dep. at 44-45, 67 (Exhibit 6).

Dated: November 12, 1997

Respectfully submitted,

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